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ABSTRACT

This bulletin reviews the 1990-91 term of the U.S. Supreme Court in terms of its impact on public schools, finding that the Court tended to decline to review decisions by lower courts that gave school districts discretion to resolve questions of student and employee rights. Court opinions that were handed down are discussed, and the impact of cases that the Court declined to review is also discussed. Court opinions are organized into five subject areas: desegregation, voting rights and political activity, employment and labor, student rights, and special education. (JDD)

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The 1990-91 Term of the Supreme Court and Its Impact on Public Schools

Court Declined to Review Many Decisions in '91; Authority of Schools Increases

The Supreme Court did not issue many opinions in its 1990-91 term that touch upon issues of direct interest to public schools. Instead, it tended to decline to review decisions by the lower courts that gave school districts discretion to resolve questions of student and employee rights.

The Court did, however, announce an important opinion in the area of desegregation, *Board of Education of Oklahoma City Public Schools v. Dowell*, holding that a school district cannot achieve unitary status and be released from court supervision under a desegregation order merely by demonstrating that it has complied with all outstanding court orders. To be released, the Court ruled that school districts must also demonstrate its good faith, and that all "vestiges" of past segregation have been eliminated "to the extent practicable."

The Supreme Court also decided *Clinton v. Jeffers*, a case which may have an effect on school board elections, particularly as districts consider reapportionment as a result of the 1990 census. In this case, the Court affirmed a court of appeals' decision holding that an Arkansas reapportionment scheme for its General Assembly violates Section 2 of the Voting Rights Act.

In addition, the Court decided a significant case in the area of collective bargaining which will have an impact on public schools. In *Lehnert v. Ferris Faculty Association*, the Court ruled that faculty who are not members of the union do not have to pay service fees to subsidize union activities that are not related to collective bargaining.

This review of the Supreme Court's term is divided into five sections by subject matter: (1) desegregation; (2) voting rights and political activity; (3) employment and labor; (4) students rights; and (5) special education. A list of cases and statutes discussed, with citations, is included at the end of this review.

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The summary was prepared by David Tatel and Patricia A. Brannan of the Hogan and Hartson law firm in Washington, D.C. We appreciate their cooperation in making this summary available through the Liaison Bulletin.

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Finally, the Supreme Court decided a case outside of the education area, *Rust v. Sullivan*, that may have significant ramifications for the free speech rights of both students and teachers. In *Rust*, the Court ruled that the government can prohibit family planning clinics which receive federal funds from providing abortion counseling to their clients.

The other important developments this term were the arrival of Justice Souter and the unexpected announcement of Justice Marshall's retirement. It is difficult to gauge the effect of Justice Souter's appointment on education issues because he took no part in the consideration of *Dowell* and did not author any opinions in cases involving education issues. He did, however, join the majority in *Rust*.

The effect of Justice Marshall's departure from the Court is easier to predict. Justice Marshall has consistently taken a liberal view on civil rights issues and just this term issued a scorching dissent in the *Dowell* case.

In that dissent, Justice Marshall argued that the majority's standard could allow racially- identifiable schools in historically segregated districts, which he would hold is simply unacceptable. Justice Marshall agreed with the Tenth Circuit that whether or not the Oklahoma City school district was "unitary," the district court had erred in allowing one-race schools. Justice Marshall's replacement almost certainly will add further strength to the conservative majority.

President Bush's candidate to replace Justice Marshall, Judge Clarence Thomas of the U.S. Court of Appeals for the District of Columbia Circuit, is a conservative and is particularly noted for his opposition to affirmative action programs.

This review discusses the Court's decision in *Dowell* as well as several other decisions handed down by the Court this term that are relevant to school districts. It also summarizes cases of interest to school districts that the Court declined to review, although it is extremely important to emphasize that a decision by the Supreme Court refusing to review a case, known as a denial of *certiorari*, means that the Court has decided not to consider the case, and that the lower court decision will therefore stand.

It does not necessarily mean that the Court agrees with the lower court's decision. The Court has very broad discretion as to what cases it considers important enough to review, and does not explain its reasons for declining to review a case. In addition, this summary identifies a number of cases that the Court has agreed to hear in its term beginning October 1991 which may have an impact on school districts.

The most important of these are: *Freeman v. Pitts*, a desegregation case; *Franklin v. Gwinnett County Public Schools*, a Title IX suit, and *Lee v. Weisman*, a lawsuit involving invocations at public school graduations.

I. Desegregation

In its long-awaited opinion in *Board of Education of Oklahoma City Public Schools v. Dowell*, the Supreme Court reaffirmed the fundamental principles established by the Court in *Brown v. Board of Education* and other important school desegregation cases such as *Green v. County School Board of New Kent County* and *Swann v. Charlotte-Mecklenburg Board of Education*. It also provided answers to *some* of the issues that surround the question of when school desegregation cases end, but left a number of questions unanswered.

A brief history of the case may be helpful to understanding the implications of *Dowell*. Prior to 1954, the Oklahoma City public schools were segregated by law. In 1961, a group of black students and their parents sued the Oklahoma City Board of Education to end segregation. The district court found that the Oklahoma City Board had intentionally segregated both schools and housing. After a number of desegregation efforts, the district court, in 1972, ordered the Board of Education to adopt a desegregation plan involving significant student reassignments which required increased transportation of students.

In 1977, the district court found the school district "unitary," but did not lift the injunction requiring student reassignments. The plaintiffs did not appeal this order, and the Board continued to implement the plan.

In 1984, the school district adopted a new student assignment plan which discontinued transportation for desegregation for students in grades one through four. This new plan resulted in 11 elementary schools returning to enrollments of more than 90% black and 22 others exceeding 90% white enrollment. The plaintiffs sought to reopen the case and challenge the new desegregation plan. The district court, however, upheld the school district's actions.

In 1989, after protracted proceedings in the Tenth Circuit and the district court, the Tenth Circuit reversed the district court. Relying on a Supreme Court antitrust decision, *United States v. Swift & Co.*, the Court of Appeals held that a desegregation decree remains in effect until a school district can show "grievous wrong evoked by new and unforeseen circumstances."

The Supreme Court reversed this decision, ruling that this formulation of the *Swift* standard was not applicable to school desegregation cases. Rather, the Court concluded that, if a school district has complied in good faith with a desegregation decree and eliminated the vestiges of past discrimination to the extent practicable, it is entitled to have a school desegregation decree terminated. When the decree is terminated, the Court explained, the school district can change the desegregation plan as long as it does not commit any new intentional acts of discrimination.

The Supreme Court's decision in *Dowell* was a reiteration of earlier Supreme Court doctrine articulated in *Swann* and *Green*. As the Court ruled in those cases,

and restated in Dowell, in determining whether the effects of segregation have been eliminated to the extent practicable, the lower courts should look "to every facet of school operations," including student assignment, faculty, staff, transportation, extracurricular activities and facilities.

According to *Dowell*, a school district seeking a determination of unitary status and freedom from continuing court supervision under a desegregation order must show that it has met the following three criteria: (1) that it has complied with its desegregation orders in good faith; (2) that it is unlikely to return to its former discriminatory ways; and (3) that it has eliminated the vestiges of past segregation from all aspects of school operations "to the extent practicable." Once it has met these three criteria, the district is entitled to a clear pronouncement of unitary status and freedom from continued court supervision.

The *Dowell* opinion emphasizes that once a school district has been properly declared unitary, it is entitled to be free from any further court supervision, although it still remains subject to the constitutional prohibition against intentional racial discrimination. The Court expressed strong views about returning districts to local control and the importance of the holding that unitariness equals no more court supervision.

Although the Supreme Court outlined the requirements a school district must meet to obtain unitary status, it remanded the case to the district court and did not provide any explicit guidance for determining when those requirements have been met. District courts thus will have to decide whether a school district has met the three tests on a case-by-case basis.

While the Court reiterated what it had said in 1968 in *Green* -- that district courts should look to student, faculty and staff assignments as well as transportation, extracurricular activities and facilities in determining whether a school district has eliminated the vestiges of segregation to the extent practicable -- it did not indicate whether an examination of these six factors alone completes the inquiry.

The Court's lack of clarity in this area is particularly significant for school districts which have one-race or racially-identifiable schools. While Justice Marshall's dissent made clear that he would hold that such schools are a vestige of segregation, the majority likely did not intend that the existence of such schools, in itself, necessarily constitutes a vestige of past segregation.

In a footnote, the majority in *Dowell* suggested that current patterns of residential segregation that contribute to one-race schools are not vestiges of past segregation so long as they are the result of "private decisionmaking and economics." The Court declined to resolve, however, what evidence a school district must offer in order to show that current residential segregation is not related to past intentional segregation.

On the same day the Court decided *Dowell*, it declined to review a case involving the Denver School District. In the Denver case, *Keyes v. School District No. 1, Denver*, the court of appeals declared that a school district may be found unitary with respect to one or more of the *Green* factors, even though it is not unitary with respect to other *Green* factors. In denying certiorari, the Court left standing the Tenth Circuit's decision that the Denver District is not unitary.

In the Topeka case, *Board of Education v. Brown*, the same case the Supreme Court originally decided in 1954, the court of appeals ruled that the existence of racially-identifiable schools in a system formerly segregated by law creates a presumption that those schools exist as a result of past discrimination. In such a situation, the Tenth Circuit said the school district has the affirmative duty to eradicate all vestiges of past discrimination to the maximum extent feasible. The petition for review of Brown is still pending before the Court.

The Court has agreed to review *Freeman v. Pitts*, a desegregation case involving the DeKalb County, Georgia school system. The issues in *Pitts* are whether a school district that was once required by state law to operate segregated schools can achieve unitary status, despite its current operation of racially-identifiable schools, and whether a school district can be unitary with respect to some of the *Green* factors and not others.

The court of appeals in Pitts insisted that the school district desegregate its racially identifiable schools, despite the school district's argument that the segregation in those schools results from demographic changes, not past intentional segregation. The Eleventh Circuit also said that the school district cannot achieve unitary status without satisfying the six *Green* factors *simultaneously* for several years.

By agreeing to hear *Pitts*, the Supreme Court implicitly recognized that *Dowell* left several important issues open. It is therefore likely that *Pitts* will provide more guidance on how to determine whether a school district is unitary.

II. Voting Rights and Political Activity

Decisions Affect Scope of School Board Authority

The Court decided one case in the voting rights area this term, *Clinton v. Jeffers*, and may hear another one next term, *Board of Public Education and Orphanage for Bibb County v. Lucas*. These cases have implications for school board elections and the scope of school board authority.

In *Clinton*, the Court affirmed the decision of an Arkansas district court that the Arkansas apportionment scheme for its General Assembly elections violates Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. Sec-

tion 2 of the Voting Rights Act prohibits voting practices and procedures which result in the denial or abridgment of the right to vote on account of race or color.

A practice or procedure denies or abridges the right to vote when it results in people of color having less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The Arkansas district court ruled that Arkansas' apportionment scheme resulted in blacks having less opportunity to elect candidates of their own choice because it created only five majority black districts where sixteen were possible in a reasonably compact geographical area.

The same Voting Rights Act requirements which govern General Assembly elections govern school board elections. Thus, in drawing voting districts for school board elections, school districts should try to ensure that the configuration of those districts does not result in less opportunity for people of color to elect candidates of their choice.

One case that came before the Court this term, and may be before the Court again next term, is *Board of Public Education and Orphanage for Bibb County v. Lucas*. *Lucas* raises the question whether a county board of education's practice of including several bond proposals on a single referendum, thus giving voters an all-or-nothing choice, constitutes a standard, practice or procedure which has the potential for abridgement of the right to vote on account of race under Section 2 of the Voting Rights Act.

The plaintiffs in the case alleged that the single referendum forces minority voters who support some, but not all, of the proposals to vote for proposals they do not support, thereby diluting their voting strength. The Eleventh Circuit, reversing the district court, held that this procedure does constitute a standard or practice which potentially could violate Section 2 of the Act.

The Supreme Court granted *certiorari*, vacated the judgement, and remanded the case to the Court of Appeals to clarify a jurisdictional question raised by the Solicitor General in his amicus curiae certiorari brief. The resolution of this question may put the decision in front of the Court again next term.

One upshot from a decision favorable to the plaintiffs in *Lucas* is that school districts which now put several types of funding proposals on one ballot may have to conduct separate votes on each proposal. This could make approval of funding of construction projects harder for school boards where parents are likely to vote only for those proposals which benefit their children.

The Court declined to hear one other case, *Solomon v. Liberty County, Florida*, which raises voting rights issues in the context of a school board election. In *Solomon*, black voters alleged that Liberty County's at-large elections of school board members violated the Voting Rights Act. The appeals court held that the plaintiffs had demonstrated the threshold requirements of a Voting Right Act violation and sent the case back to federal district court for a trial. The ultimate decision in the case may require election of school board members by district instead of at-large.

Court Decision on Political Organization Provides Little Guidance for School District

The Court's only decision this term in the area of political organization, *Geary v. Renne*, does not provide much, if any, guidance for school districts. In *Geary*, a group of voters challenged a California state constitutional provision that prohibits endorsement of candidates for school boards and other non-partisan offices by political parties, claiming that the constitutional ban on endorsement violates their right to free speech. In support of their claim, the voters pointed to several instances in prior elections where county officials enforcing the provision had altered candidate statements to delete references to political parties.

Before the district court and the court of appeals, California state officials argued that the ban on endorsements was legitimate because the state had an interest in ensuring that elections for offices like school boards remained free of political influence. Both the district court and the court of appeals rejected that reasoning and ruled that the ban violated the free speech protections of the First Amendment and was therefore unconstitutional.

The Supreme Court did not decide the free speech issue because it found that the plaintiffs in the case only had the right to challenge the California constitution's application to them individually; they did not have the right to challenge the application of the ban to political parties or to voters in general.

The Court also declined to decide whether the ban had violated the individual plaintiffs' right to free speech because the elections in which state officials had deleted references to political parties had already been held. As a result, a decision by the Court could not remedy the specific injuries of which the plaintiffs complained, and the case was, in the Court's terminology, moot.

Although the plaintiffs also claimed that the ban on political endorsements interfered with their right to free speech in future elections, the Court refused to decide the constitutionality of the ban on future elections because it did not know the particular election and candidates involved and could not be sure that county officials would enforce the ban in the future.

Because the Court sidestepped the free speech issue, California's ban on political endorsements in school board elections remains in force, at least until the plaintiffs have a factual record that will allow the Court to decide all of the issues presented.

The Court declined to review *Wisconsin Education Association Council v. Wisconsin State Elections Board.* In that case, the Wisconsin Education Association Council ("WEAC"), a voluntary education association, and WEAC-PAC, its political action committee, challenged the Wisconsin Supreme Court's interpretation of a state statute that exempts certain political communications from disclosure requirements and contribution limitations.

The Wisconsin Supreme Court held that the exemption did not exempt any expenses incurred by WEAC or WEAC-PAC in connection with communications between interns, who were hired to mobilize the membership in support of certain candidates, and its members. The Wisconsin Supreme Court held that the plain language of the statute required such a holding.

WEAC claimed that the Wisconsin Supreme Court's interpretation of the statute deprives it and its members of the right to free speech and association by burdening the association's efforts to communicate with its members. Because the Court declined review, the Wisconsin Supreme Court's interpretation will stand.

III. Employment and Labor

Unions and Collective Bargaining: Cases Not Heard Send Messages

In the area of collective bargaining, the Court decided one case involving the types of activities for which "service fees" of nonmembers may be used, but refused to hear two related cases. In *Lehnert v. Ferris Faculty Association*, the Supreme Court held that faculty who are not union members do not have to pay "service fees" to subsidize union activities that are not directly related to their local collective bargaining efforts. At issue was whether nonmembers could be charged for the cost of certain lobbying, public relations, and litigation, without unconstitutionally burdening nonmembers' rights to freedom of speech and association.

The Supreme Court had previously held in *Abood v. Detroit Board of Education* that, in the public employment context, a "service fee" was constitutional, but that, as in the private employment context, certain guidelines must be followed to determine how such fees may be used. According to the Court in Abood:

> *chargeable activities must (1) be "germane" to the collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding "free riders" and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.*

Using these guidelines, the Court in *Lehnert* held the following expenses to be unconstitutional uses of nonmembers "service fees: (1) lobbying and political activity that does not relate to the ratification or implementation of the union contract; (2) activities to secure additional funds for public education in the state; (3) portions of the union publication which did not relate to the ratification or implementation of the contract; (4) litigation that does not concern the bargaining unit and literature discussing such litigation; and (5) public relations campaigns to promote the reputation of the teaching profession generally. The Court, however, found that unions could use "service fees" for activities such as sending delegates to union conventions because attendance at conventions may ultimately benefit the members of the local union. In addition, objecting employees may be charged for strike preparations, even when the strike itself would be illegal, because the Court views strike preparations as an effective bargaining tool.

The Court declined to review two related cases this term:

> ***Lillebo v. Davis,*** *in which a California appeals court upheld a state law directing that nonmembers pay a reduced fee to the union for costs associated with collective negotiation, contract administration and employment benefits, including lobbying activities for better terms and conditions of public employment; and*
>
> ***Hudson v. Chicago Teachers Union,*** where the Seventh Circuit ruled that the union had provided sufficient information for nonunion employees to determine whether fees they were paying were going for collective bargaining or for the union's other political activities.

Civil Rights and Discrimination Cases Resolved in School District Favor

In the area of civil rights and discrimination, the Court decided *Gilmer v. Interstate/Johnson Lane Corp.*, which is an age discrimination case that may have an impact on school districts, and *West Virginia University Hospitals v. Casey*, an attorneys' fee case that may limit the ability of some plaintiffs to bring civil rights suits. The justices refused to review a number of decisions, however, in which employees' discrimination suits were dismissed by lower courts, possibly signaling a continued willingness to allow these courts to define the parameters of discrimination actions.

As a result of *Gilmer*, school districts may be able to avoid costly litigation in age discrimination cases. In *Gilmer*, the Court held that *Gilmer*, a sixty-two-year-old man who was fired and replaced by a twenty-eight-year-old woman, could not sue in federal court under the Age Discrimination in Employment Act because he was bound by an agreement to arbitrate all employment

disputes. The Court dismissed *Gilmer's* contention that arbitration would undermine the role of the Equal Employment Opportunity Commission in age discrimination cases, stating that the agency would continue to receive information relating to age discrimination claims and retain the right to investigate such claims.

While this case arose in the context of the securities industry, in which arbitration is mandated as a condition of registering with the New York Stock Exchange, it is relevant to school districts since many teachers are covered by binding arbitration agreements. In deciding *Gilmer* however, the Court left the most pressing issue unresolved: whether compulsory arbitration clauses in employment contracts are enforceable under the 1925 Federal Aviation Act. The resolution of this issue may have a significant impact on the manner in which disputes are addressed within school districts.

In a case impacting civil rights litigation of all types, including desegregation suits, the Court held this term in *West Virginia University Hospitals* that expert fees in civil rights litigation cannot be shifted to losing defendants as part of "reasonable attorneys' fees" allowed under civil rights statutes. This decision will reduce somewhat the costs for school district defendants which lose such litigation, and may deter the bringing of some complex suits or at least promote settlement.

The Court agreed to hear next term *Franklin v. Gwinnett County Public Schools*, which presents the issue whether victims of intentional gender discrimination may receive compensatory damages under Title IX of the 1972 Education Amendments, the federal law prohibiting sex discrimination in federally funded education programs.

The *Franklin* case arose in the context of a female high school student who claimed she was sexually harassed by a male teacher. The Justice Department maintains that Title IX does not permit monetary damages.

The decision in this case undoubtedly will affect the interpretation of Title VI of the Civil Rights Act of 1964, which prohibits racial discrimination in all federally funded programs, because the language of the two statutes is virtually identical. The damages allowed under Section 504 of the Rehabilitation Act of 1973-, which protects the rights of handicapped persons in federally funded programs, similarly could be affected by the *Franklin* decision. The Supreme Court declined to review two other cases involving sex discrimination claims.

In Massillon Board of Education v. Farber, a federal district judge reduced by half a jury award to a highly qualified female teacher who was twice passed over for hiring in favor of younger, less qualified men. The appeals court overturned the judge's reduction of the jury award and also overturned the lower court's dismissal of plaintiff's two Title VII sex discrimination claims. In each instance, the appeals court found the plaintiff to have made a prima facie showing of Title VII gender discrimination where the evidence demonstrated that less qualified males were selected to fill the positions for which plaintiff applied.

In Jackson v. Harvard University, the First Circuit ruled that a female professor denied tenure could not sue under Title VII for bias due to subconscious stereotypes and prejudices held by a member of the tenure review committee because Title VII requires proof of intent to discriminate.

The Court also refused to hear several cases in which claims of discrimination based on race and national origin were dismissed in the lower courts.

In Fields v. Hallsville Independent School District, the Fifth Circuit shielded the Texas Education Department from suit by two teachers who sued-after--failing the state teachers' exam, claiming that the cut-off score discriminated on the basis of race and age. The Fifth Circuit said that the education department was not the teachers' employer for the purpose of anti-discrimination suits.

In DeVargas v. Mason & Hanaer-Silas Mason Co., the Tenth Circuit held that the 1987 Civil Rights Restoration Act ("CRRA") does not apply retroactively to cases pending before its passage.

The CRRA was passed to make clear that federal civil rights statutes apply to an entire institution when it receives any federal funding, and not merely, as the Supreme Court had held in *Grove City College v. Bell*, to the specific programs within those institutions which receive the federal money. Other courts of appeals, however, have ruled that the CRRA may be applied retroactively.

Constitutional Rights of Teachers and Other Employees

Freedom of Speech, Association and Religion and Right to Privacy

The Supreme Court decided a significant case this term that may have an impact on the constitutional rights of teachers and other employees.

In *Rust v. Sullivan*, the Court held that placing conditions restricting speech upon the receipt of federal funds does not violate the First Amendment free speech guarantees where the conditions do not force the recipient of the funds to give up the speech, but

merely require the recipient to keep that speech separate from the funded activity. The First Amendment issue in *Rust* revolved around Title X and the implementing regulations that prohibited, as a condition of receiving federal funds, doctors in the course of their duty at the project from counseling abortion or referring for abortion.

The Court found that petitioners-doctors' free speech rights were not violated by the regulations because the government does not have an obligation to subsidize the exercise of fundamental rights, including speech rights. The Court noted that because petitioners were free to say whatever they liked outside the Title X project, the First Amendment was not violated.

The Court's rationale in *Rust* could have a significant impact on schools. Should the Court decide to extend broadly its holding that Congress can tie virtually any condition, including restrictions on speech, to the acceptance of federal funds, this rationale could be used to permit the government to prohibit teachers and other school administrators from discussing subjects like abortion when administering school programs for which they receive federal money. It also could be used to affirmatively require that certain subjects be taught or not taught, and even potentially could lead school teachers and administrators back into the debate over prayer in the schoolhouse.

A petition for review in a case involving teachers' freedom of speech and religion, *Roberts v. Madigan*, is now pending before the Court. This case involves a public school teacher who was banned from silently reading the Bible in the classroom. If the Court decides to hear the case, it will have to balance the teacher's right to free exercise of his religion with the Constitution's ban on state establishment of religion.

The Court refused to review a number of lower court decisions in cases involving individual rights, some of which arose in the higher education setting. The Court's refusal to hear these cases let stand several potentially significant decisions supporting individual rights.

Curlee v. Fyfe involved a white secretary in a Mississippi school district who was transferred to a different job with less responsibility but the same pay after she enrolled her daughter in an all-white private school. The appeals court held that the secretary's constitutional rights to family privacy and freedom of association and speech had been violated.

***In Mississippi Employment Security Commission v. McGlothin**, the court of appeals held that a teacher's rights to freedom of speech and religion were violated when she was denied unemployment benefits after being dismissed for wearing an African headwrap that did not conform to the school's dress code.*

***Matthews v. DiBona** was a case in which the cancellation of a community college play was found to violate both the teachers' and the students' rights to free speech.*

***Wharton v. Dube** involved a state university professor whose free speech rights were violated when he was denied tenure for teaching that Zionism is a form of racism. The high court refused to review the appellate court's decision that school officials are not immune to suit in this situation.*

***In Philbrook v. Ansonia Board of Education**, an appeals court held that a Connecticut school board's leave policy which prohibits employees from using "necessary personal leave" for religious reasons does not violate employees' religious freedom because the board restricts leave for a variety of nonreligious activities as well.*

In addition to cases involving the First Amendment rights of freedom of speech, religion, and association, the Court let stand a decision limiting a New York teacher's right to privacy, *Strong v. Board of Education of Uniondale Union Free School District*. In that case, an appeals court found that there had been no violation of a teacher's right to privacy when she was required to submit medical records before being reemployed in a school from which she had taken a long medical leave of absence.

Procedural Rights of Teacher Upon Termination

The Court did not decide any cases regarding the procedural rights of teachers upon termination. It did, however, refuse to review a number of cases which involved such procedural rights, some of which arose in the higher education context.

***In Independent School District No. I-3 v. Rankin**, an Oklahoma statute requiring a teacher who is not reemployed to pay half the cost of the termination hearing was found to inhibit the teacher's exercise of the constitutional right to due process.*

***In Cooper v. Williamson County Board of Education**, an appeals court held that a teacher's due process rights were not violated where the committee that fired the teacher exercised both investigative and adjudicatory functions.*

***In Morales v. Kansas State University**, the Court declined to review a decision that a pro-*

fessor was not entitled to full legal representation during an administrative hearing.

In Board of Trustees of University of Kentucky v. Hayes, the Court let stand a decision that a university had waived sovereign immunity to a lawsuit by a professor denied tenure when it did not assert that immunity.

Kemp v. State Board of Agriculture involved a decision in which the university was allowed to dismiss the discrimination claims of an employee who violated internal grievance procedures by writing a letter to her senator requesting an investigation into possible civil rights violations. Because plaintiff requested a closing hearing process, the letter violated the grievance procedures by involving an outside individual in the proceedings prior to the decision.

The lower courts seem to be most concerned with ensuring teachers access to an adjudicatory forum, as illustrated by the decisions in *Rankin* and *Hayse*. Within the forum, however, schools seem to have some leeway to shape the process, as illustrated by the decisions in *Morales*, *Cooper* and *Kemp*. In addition, the courts seem willing to limit access to the federal courts where other remedies exist or where the complainant has abused other procedures, as the decisions in *Durham* and *Kemp* show.

IV. Student Rights

Religion

Last term, the Supreme Court decided *Board of Education of the Westside Community Schools v. Mergens*, in which it approved the legality and constitutionality of student-initiated religious activities in public schools under the Equal Access Act. Under *Mergens*, school districts are required to provide equal access to all groups regardless of the philosophical, political, religious, or other content of their members' speech, unless the schools decide to prohibit all non-curriculum-related student groups from using school facilities on an equal basis.

The Act's equal access obligations also may require official school recognition if such recognition is necessary for access to various school facilities and publications.

The Court announced no decisions in this area this term, but did agree to decide *Lee v. Weisman* next term. *Weisman* presents the question whether a school district violates the Establishment Clause of the First Amendment when it allows a speaker at a middle or high school graduation to offer an invocation in the form of a prayer. The Establishment Clause prohibits government sponsorship or promotion of religion.

The First Circuit ruled in *Weisman* that an invocation at a middle or high school graduation violates the Establishment Clause because it fails the test the Supreme Court established in 1971 in *Lemon v. Kurtzman*, which requires a three-pronged analysis: (1) whether the challenged practice has a secular purpose; (2) whether the practice has the effect of advancing or inhibiting religion; and (3) whether the practice fosters "excessive government entanglement with religion." The First Circuit upheld the district court's decision that prayer at middle and high school graduations offends the second prong of the *Lemon* test because it has the effect of "creat[ing] an identification of the school with a deity and therefore religion."

Weisman presents the Court with an opportunity to eliminate or at least reformulate the frequently criticized *Lemon* test. Any decision by the Court to make the *Lemon* test more lenient would have a tremendous effect on the role of religion in public schools and, would likely allow practices previously disallowed as violation of the Establishment Clause. A more lenient version of *Lemon* might also eliminate current barriers to government funding of church-related schools, permitting inclusion of parochial schools in frequently proposed parental choice/voucher programs for public education.

The Court also was asked to review three other cases in which the courts of appeal applied the *Lemon* test. The Court declined to review two, *Doe v. Human and Centennial School District v. Gregoire*, and has still not decided whether to review the other, Roberts v. Madigan.

***In Doe v. Human**, a school district refused to offer Bible classes to its students during regular school hours on a voluntary attendance basis. The court of appeals ruled that the classes failed the Lemon test and thus violated the Establishment Clause.*

***In Centennial School District v. Greaoire**, a school district denied the request of a religious organization to have access to a high school gym for an evening performance and lecture by an evangelist. The school district's decision was based on its policy which allowed access to school facilities by civic groups but barred use for religious services, instruction or religious activities. The court found that the district had created a designated open forum by allowing such activities as religious discussion in its evening classes and in its student activity period to which outsiders may be invited. The court of appeals ruled that the school district's decision violated the religious group's First Amendment right to free speech.*

***Roberts v. Madigan** involved a school district's directive to require a fifth grade teacher to stop reading the Bible silently to himself and to re-*

move his Bible from display in the classroom. The teacher claimed that this order violated the Establishment Clause because, under the Lemon test, it had the primary effect of disparaging Christianity. The court of appeals rejected the teacher's argument and ruled that the school district would bar his actions because they had the primary effect of endorsing a religion to his students.

Court Upholds Schools In Students' Constitutional Rights Cases

Since its 1988 landmark decision in *Hazelwood v. Kuhlmeier*, in which the Supreme Court held that school officials may restrict school-sponsored student speech so long as the restriction is "reasonably related to legitimate pedagogical concerns," the Court has not agreed to hear any cases involving free speech in the public schools. Thus, under Hazelwood, school administrations retain broad authority to regulate school-related speech.

This term the Court refused to hear the following cases involving students' constitutional rights:

***Treshman v. Texas**, in which the court rejected the defendant's claim that his arrest violated his First Amendment right to free speech because it occurred while he was on school grounds distributing information AIDS, herpes and abortion to students;*

***McCain v. Houston Independent School District**, in which the court of appeals ruled that a school district did not violate a student's right to due process when it suspended her for drinking beer on school grounds; and*

***Patterson v. FBI**, in which the court of appeals ruled that the FBI did not violate a sixth-grader's right to privacy when it monitored him and compiled records on him in connection with his school project that involved sending letters to the leaders of over 100 foreign countries because the FBI showed that the records it compiled on the student were relevant to its law enforcement activities.*

Liability of School Districts for Employee Misconduct

The Court issued an opinion in *Pacific Mutual Insurance Co. v. Haslip*, which could be of significance to school districts because it presented the question whether a punitive damage award calculated by a jury can be so excessive as to violate due process. The plaintiffs sued Pacific Mutual for damages when their health insurance coverage lapsed because the Pacific Mutual agent who had arranged for the coverage through another insurance company misappropriated their premium payments. At trial, the jury was instructed that it could award punitive damages to the plaintiffs if it determined that Pacific Mutual was guilty of fraud. The jury returned and awarded over $1 million to the plaintiffs. Pacific Mutual took the case to the Supreme Court, where it argued that the award violated due process.

The National School Board Association ("NSBA") filed a friend-of-the-court brief, urging the Court to overturn the award in *Haslip*. NSBA argued that punitive damage awards exceeding $1 million now have become almost commonplace, and that the Court needs to set some limit to bring rationality to the current damage award climate.

The Supreme Court ruled that the method used to assess the punitive damages against Pacific Mutual did not violate due process. The Court stated, however, that even if a method used to assess punitive damages is constitutional, the award itself may not be. Thus, the Court went on to determine whether the damage award against Pacific Mutual violated due process. The Court concluded that it did not because the instructions to the jury and the post-trial review of the award by the Alabama Supreme Court protected the defendant against payment of an unreasonable amount.

The Court's decision in *Haslip* means that plaintiffs who sue school districts may be awarded punitive damages (to the extent permitted by the sovereign immunity protecting public entities from damage awards). The Haslip decision, however, does guarantee that school districts will receive at least the same degree of protection against payment of unreasonable awards as the Court awarded Pacific Mutual in *Haslip*. Moreover, Haslip leaves open the possibility that, in certain circumstances, an award of punitive damages against a school district would be unconstitutional.

The Supreme Court left standing two cases where courts of appeals had refused to impose liability on school districts:

***Fee v. Herndon**, where the court of appeals ruled that a student who alleged excessive corporal punishment by a teacher could not bring a due process claim in federal court because adequate state tort law remedies were available; and*

***D.T. v. Independent School District No. 16**, in which the court of appeals refused to impose liability on the school district for the acts of a gym teacher who molested students during a summer vacation. The Court also declined to review two other cases.*

W.R. Grace & Co. v. Barnwell School District No. 45 *involved a class of school districts which sought damages from several manufacturers and distributors of asbestos products. The court of appeals rejected a motion by the manufacturers and distributors to disband the class of school districts.*

ACMAT v. School District of Philadelphia involved a building contractor's claim against a school district for payment for extra work the contractor completed without express school board approval. The court of appeals refused to award payment to the contractor.

V. Special Education

The Supreme Court did not decide any cases in the area of special education this term. The Court declined to resolve the disagreement between federal courts of appeals over the obligation of school districts to extend an Individual Education Plan ("IEP") beyond the regular school year by refusing to hear either *Cordrey v. Euckert* or *Independent School District No. 4 of Tulsa County. Oklahoma v. Johnson.* Five circuits-- *Battle v. Pennsylvania* (3d Cir.), *Crawford v. Pittman* (5th Cir.), *Georgia Association of Retarded Citizens v. McDaniel* (11th Cir.), *Independent School District No. 4 of Tulsa County. Oklahoma v. Johnson.* (10th Cir.), *Yaris v. Special School District* (8th Cir.) -- have held that the tendency of a disabled child to regress over the summer is itself sufficient cause to require school districts to offer extended-year services.

At least one circuit and one district court --*Cordrey v. Euckert* (6th Cir.), *Bales v. Clarke* (E.D. Va.) -- in contrast, have required parents to make a greater showing of need than the mere tendency to regress in order to require a school district to extend educational services into the summer.

The high court also declined to review a decision in *Chester Upland School District v. Lester H.* in which a school district was required to provide 30 months of education beyond a disabled student's 21st birthday to compensate him for instructional time missed while he was waiting to be placed in a private school. In addition, the Court declined to hear two cases involving procedural aspects of IEP hearings.

In Roland M. v. Concord School Committee, *an appeals court limited parents' use of expert witnesses at trial in an IEP appeal by upholding the district court's refusal to allow the parents to present expert witnesses when they had been given an opportunity to present their expert's testimony at the earlier administrative hearing but deliberately withheld the witnesses from the proceedings.*

In District of Columbia v. Moore, *an appeals court ruled that schools must pay attorneys' fees for parents who win administrative hearings on behalf of their disabled children.*

Five circuit courts -- ***Arons v. New Jersey Board of Education*** (3d Cir.), ***Duane M. v. Orleans Parish School Board*** (5th Cir.), ***Eggers v. Bullit County School District*** (6th Cir.), ***McSomebodies v. Burlinqame Elementary School*** (9th Cir.), ***Mitten v. Muscoqee County School District*** (11th Cir.) -- with jurisdiction over 19 states (Alabama, Arizona, California, Delaware, Florida, Georgia, Kentucky, Idaho, Louisiana, Michigan, Mississippi, New Jersey, Nevada, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Washington) and the District of Columbia now maintain that position.

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